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Marshall L. Perkins

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The Writing's on the Wall: The Intent Requirement in Louisiana Destination Law

INTRODUCTION

Sometimes, neighbors are a pain. Overhanging tree branches, unmowed lawns, or loud dogs could get under anyone's skin. However, neighbors sometimes go too far. Imagine that your house's water supply is piped in from a reservoir on your neighbor's property. The pipe connecting your house to the reservoir is above ground. Some time ago, both your lot and your neighbor's lot belonged to a single, "common" owner. In preparing to sell both lots, the common owner built the reservoir and pipe. When he sold the properties, however, the common owner neglected to say anything about the arrangement. Years later, your neighbor decides that he is sick of looking at the reservoir and decides that it is time to tear it down. When you complain, he points out that you and he never contracted to maintain the situation. Infuriated, you seek a court order trying to stop him from destroying your access to the reservoir.

If this scenario occurred in any state but Louisiana, you might be out of luck. Many common law jurisdictions have refused to recognize "easements by implication"—burdens on an estate created without an express grant such as the pipeline situation described above—except in a few narrow circumstances.¹ If the above hypothetical occurred in Louisiana, however, you would probably have a valid claim. The Louisiana Civil Code recognizes that, in some scenarios, an estate can be burdened without the agreement of the owners.² One of these methods, taken directly from the French Civil Code, is known as "destination of the owner."³ Destination of the owner can arise in two ways: (1) The owner of an estate creates a burden, or "charge," in favor of one

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1. See, e.g., *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938) (reasoning that an easement by implication by prior use is difficult to justify when the implied benefit is being claimed by the grantor); *Othen v. Rosier*, 226 S.W.2d 622 (Tex. 1950) (stating that Texas courts only recognize easements by implication by strict necessity). See also 28A C.J.S. *Easements* § 21 (2011). An in-depth discussion of common-law easements by implication is outside the scope of this Comment, which is solely concerned with Louisiana property law.

2. See discussion *infra* Part I.A.

3. Destination is based on the French Civil Code regime of *destination du père de famille* or "destination of the father of the family." See discussion *infra* Part I.C–D.

portion of the estate, then later transfers ownership of one or both portions; or (2) the common owner of two estates creates a charge on one in favor of the other, then later transfers ownership of one or both estates.⁴ Under Louisiana Civil Code article 741, once the estates cease to belong to the same owner, a predial servitude—the civilian counterpart of an easement⁵—comes into existence unless the parties expressly agree otherwise.⁶

Recently, the Louisiana Supreme Court reasoned that a party who asserts that a predial servitude was created by destination must prove the “intent” of the common owner to create the servitude.⁷ According to the court, evidence of the common owner’s intent consists of exterior signs of the servitude at the time common ownership ceases.⁸ The supreme court based its reasoning on the Louisiana Fourth Circuit Court of Appeal’s earlier application of this intent requirement.⁹

This Comment argues that the subjective intent requirement is highly questionable and should be abandoned in favor of a more objective standard. Because destination issues arise only in the absence of an agreement between the parties, destination implies a fictional agreement between them.¹⁰ Because no actual agreement exists between the parties, the question is whether the parties should have reasonably believed that a servitude would be created.¹¹ This determination is based upon the obvious signs of a burden on one of the estates in favor of the other.¹² That objective inquiry efficiently resolves destination disputes by simply determining whether the situation was apparent, or “perceivable by exterior works, signs, or

4. See A. N. Yiannopoulos, *Creation of Servitudes by Prescription and Destination of the Owner*, 43 LA. L. REV. 57, 77 (1982).

5. *Rose v. Tenn. Gas Pipeline Co.*, 508 F.3d 773, 776–77 (5th Cir. 2007).

6. LA. CIV. CODE art. 741 (2011). Article 741 provides:

Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners.

When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right and a nonapparent servitude comes into existence if the owner has previously filed for registry in the conveyance records of the parish in which the immovable is located a formal declaration establishing the destination.

Id.

7. *Phipps v. Schupp*, 45 So. 3d 593, 598–602 (La. 2010).

8. *Id.*

9. See *id.*; see also discussion *infra* Part I.C.

10. See discussion *infra* Part III.B.

11. See Lee Hargrave, *Property—Review of Recent Developments: 1991–1992*, 53 LA. L. REV. 953, 960 (1993).

12. *Id.*

constructions.”¹³ A requirement that a party provide evidence of the common owner’s subjective intent invites inefficiency and uncertainty into this area of the law and should therefore be eliminated.¹⁴

Accordingly, this Comment analyzes the reasoning behind the jurisprudential intent requirement. Part I provides the relevant codal and historical background of destination. Part II discusses how the intent requirement entered into the jurisprudential application of article 741. Part III analyzes the relevant French doctrine on the issue. Part IV examines the conceptual and practical difficulties that the intent requirement presents and concludes that courts should take an objective approach in applying article 741. The approach should be framed in terms of a tacit agreement between the parties to continue the relationship that existed at the time that the estates ceased to belong to the same owner. If there is any element of subjective intent in a destination case, it is only a bilateral *tacit* intention between the parties at the moment ownership is severed.

I. BACKGROUND

The following discussion defines *predial servitudes* and explains how they are created under the civilian idea of “destination of the

13. LA. CIV. CODE art. 707 (2011).

14. Destination claims arise more often than the reader might think. *See, e.g.,* Huy Tuyet Tran v. Misuraca, No. 2010 CA 2183, 2011 WL 2617382 (La. Ct. App. 1st May 6, 2011) (holding that a servitude of passage was created by destination of the owner); Davis v. Provost, 980 So. 2d 821, 826 (La. Ct. App. 3d 2008) (discussing creation of servitudes by destination); Trunk v. Berg, 866 So. 2d 922, 928 (La. Ct. App. 5th 2004) (refusing to apply article 741 retroactively); W.L. Wagner v. Fairway Villas Condominium Assocs., Inc., 813 So. 2d 512, 517 (La. Ct. App. 3d 2002) (holding that because underground pipes were nonapparent, no servitude of aqueduct was created under article 741); Jackson v. Jackson, 818 So. 2d 192, 197–98 (La. Ct. App. 1st 2002) (concluding that an apparent servitude of drain was created the moment that the property was partitioned); Griffith v. Cathey, 762 So. 2d 29 (La. Ct. App. 3d 2002) (holding that because plaintiff never owned defendants property, no servitude could be created by destination); Comby v. White, 737 So. 2d 94, 96–97 (La. Ct. App. 3d 1999) (finding that utility lines constituted evidence of apparent servitude existing at severance of ownership); McCann v. Normand, 696 So. 2d 203, 206–07 (La. Ct. App. 3d 1997) (holding that because article 741 is a substantive law, it cannot be applied retroactively); Williams v. Wiggins, 641 So. 2d 1068, 1073 (La. Ct. App. 2d 1994) (noting that the servitude must be created by an owner, not a lessee, for destination to apply); Shell Offshore, Inc. v. Kirby Exploration Co. of Tex., 909 F.2d 811, 814–15 (5th Cir. 1990) (holding that a pipeline servitude would have been created by destination if Louisiana law had applied); Travelers Ins. Co. v. Badine, No. 93-4065, 1994 WL 577482 (E.D. La. Oct. 17, 1994) (finding a genuine issue of material fact as to whether common owner intended to create a servitude of passage).

owner.” The discussion then addresses the French roots of destination and how Louisiana law on the issue has evolved.

A. Predial Servitudes: Definition, Nature, and Distinctions

The Louisiana Civil Code defines a *predial servitude* as “a charge on a servient estate for the benefit of a dominant estate.”¹⁵ Examples of predial servitudes include rights of drain, view, light, passage, drawing water, aqueduct, and pasturage.¹⁶ A fundamental tenet of predial servitudes is that in order for one to exist, the dominant and servient estates must belong to different owners.¹⁷ Furthermore, a benefit to the dominant estate is essential.¹⁸ Without a benefit to the dominant estate, the servitude is merely a personal, or “credit,” right in favor of the estate’s owner.¹⁹

There are three types of predial servitudes: natural, legal, and conventional.²⁰ Natural servitudes owe their existence to the natural situation of estates, such as a servitude of drainage when an estate is situated above another.²¹ Legal servitudes, as the name suggests, are established by law for the benefit of the general public or the benefit of particular persons.²² Examples of legal servitudes include the obligation to keep a building in repair,²³ the prohibition of projecting over a boundary,²⁴ and the prohibition of making an opening in a common wall.²⁵ Lastly, voluntary, or “conventional,” predial servitudes are established by juridical act, acquisitive prescription, or destination of the owner.²⁶ This Comment concerns only conventional predial servitudes.

A key distinction, particularly for the purposes of this Comment, lies in the classification of a predial servitude as either apparent or nonapparent. Apparent servitudes are “perceivable by exterior signs, works, or constructions; such as a roadway, a window in a common wall, or an aqueduct.”²⁷ Nonapparent servitudes, on the other hand,

15. LA. CIV. CODE art. 646.

16. *Id.* art. 699.

17. *Id.* art. 646. This provision is an application of the Roman maxim *nemini res sua servit* (no one has a right of servitude in his own property). *Id.* art. 646 cmt. f.

18. *Id.* art. 647.

19. *See id.* art. 647 cmt. c.

20. *Id.* art. 654.

21. *Id.* art. 655.

22. *Id.* art. 659.

23. *Id.* art. 660.

24. *Id.* art. 663.

25. *Id.* art. 681.

26. *Id.* art. 654.

27. *Id.* art. 707.

have no exterior signs of their existence.²⁸ Examples of nonapparent servitudes include the prohibition of building on an estate or the prohibition of building above a certain height.²⁹ Apparent servitudes may be acquired by title, acquisitive prescription, or destination.³⁰ *Title* means an act translatif of ownership, such as a contract of sale.³¹ *Title* also contemplates a testament or partition.³² Unlike apparent servitudes, nonapparent servitudes can be acquired only by title.³³ However, this rule is subject to one, distinct exception: If a common owner has previously filed a formal declaration of destination, then a nonapparent servitude may be acquired by destination of the owner if there is no express agreement otherwise between the parties.³⁴

B. Destination of the Owner—Article 741

Most conventional and apparent predial servitudes are acquired by title.³⁵ However, Louisiana law recognizes that conventional and apparent servitudes can be acquired without title in two ways: by acquisitive prescription or by destination of the owner.³⁶ Louisiana Civil Code article 741 defines *destination* as follows:

Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners.

When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right and a nonapparent servitude comes into existence if the owner has previously filed for registry in the conveyance records of the parish in which the immovable is located a formal declaration establishing the destination.³⁷

28. *Id.*

29. *Id.*

30. *Id.* art. 740.

31. *See id.* art. 3483 cmt. b.

32. *Id.*

33. *Id.* art. 739.

34. *See id.* art. 741. A “formal declaration of destination” simply means a title filed in the conveyance records of the parish in which the immovable is located. *Id.*; *id.* art. 739.

35. *See id.* art. 722 cmt. b. Predial servitudes may be created in any manner that immovables may be transferred. *Id.*

36. *Id.* arts. 740, 741. Acquisitive prescription is not discussed in this Comment.

37. *Id.* art. 741. Current article 741 was revised in 1977 as part of the Louisiana Legislature’s extensive revision of the Code articles on predial

A predial servitude cannot be created under article 741 unless the two estates belonged to the same owner and the common owner established the relationship giving rise to the servitude.³⁸ The “relationship established between two estates that would be a predial servitude” can arise in two distinct scenarios: (1) The owner of a single estate creates a charge in favor of one portion of the estate, then later transfers ownership of one or both portions; or (2) the common owner of two estates creates a charge on the servient estate in favor of the dominant estate, then later transfers ownership of one or both estates.³⁹ Article 741 expressly states that at the moment the dominant and servient estates cease to belong to the same person, an apparent predial servitude “comes into existence of right” unless there is a clear agreement otherwise.⁴⁰ Thus, even though there is no title regarding the servitude, the law nonetheless deems a conventional predial servitude to exist.⁴¹

C. Destination's French Origins

The creation of predial servitudes by destination is a uniquely French civilian institution.⁴² The French refer to destination as *la destination du père de famille* (the destination of the father of the family).⁴³ The provisions of the French Civil Code were drawn

servitudes. See 1977 La. Acts 1309, 1335. Article 741 is based on a combination of articles 649, 767, 768, and 769 of the Louisiana Civil Code of 1870. *Id.* art. 741 cmt. a. The effects of the revision are discussed *infra* in Part I.D.

38. LA. CIV. CODE art. 741 cmt. b.

39. Yiannopoulos, *supra* note 4, at 77.

40. LA. CIV. CODE art. 741.

41. It is somewhat odd that the Civil Code's destination provision is found in the title covering conventional predial servitudes because destination is a suppletive legal rule, which is relevant only in the absence of an agreement. *Id.* If the law supplies the “agreement” between the parties that creates the servitude, destination should be characterized as a legal servitude, which, by definition, is “imposed by law.” *Id.* art. 654. Therefore, destination is arguably in the wrong part of the Code.

42. See Yiannopoulos, *supra* note 4, at 74 (noting that the historical basis for destination is grounded in the custom of Paris); 2 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL § 1721, at 408 (7th ed. 1989) (stating that “[destination] is a mode of acquisition of servitudes unknown to Roman law”); JEAN-LOUIS BERGEL, MARC BRUSCHI & SYLVIE CIMAMONTI, TRAITÉ DE DROIT CIVIL—LES BIENS § 343, at 344 (1st ed. 1999) (arguing that French customary law on destination differed by region but was consolidated in the first redaction of the Custom of Paris).

43. Although the French use a different term than the one used in Louisiana, it is well settled that “father of the family” simply refers to the previous common owner of the two estates. See, e.g., PATRICE JOURDAIN, LES BIENS § 155, at 212

from the Custom of Paris, an early redaction of regional French customary law.⁴⁴

French doctrine differs as to the reasoning behind the institution of destination.⁴⁵ Some writers believe that for destination to apply, the common owner must intend to create a predial servitude and that such intent must be evidenced with exterior signs.⁴⁶ Although several French writers accept this basis for destination, others are not so convinced.⁴⁷ For example, some writers reject the intent idea altogether as conceptually impossible,⁴⁸ while others consider the common owner's intent to be important only in instances where the *extent* of a predial servitude is at issue.⁴⁹

Despite their differing opinions on destination, most French writers—in one way or another—agree that destination is based on the idea of a “tacit convention” between the parties that the existing state of affairs will be maintained.⁵⁰ In other words, “tacit convention” or “tacit agreement” theory provides that the owners of two estates, at the moment that unitary ownership ceases,

(1995) (“Destination of the father of the family is a particular arrangement between estates established by the common owner of them”); 5 GABRIEL BAUDRY-LACANTINERIE & EMILE CHAUVEAU, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* § 1115, at 845 (2d ed. 1899) (“[T]he situation established by the father of the family, meaning the owner of the two immovables”); 2 VICTOR MARCADÉ, *EXPLICATION THÉORIQUE ET PRATIQUE DU CODE CIVIL* § 694, at 642 (8th ed. 1886) (“[D]estination of the *pater familias*, meaning the owner of the estates”).

44. 3 MARCEL PLANIOL & GEORGE RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* § 966, at 946 n.3 (2d ed. 1952) (noting that the formula for the French Civil Code articles on destination is found in the Custom of Paris, apart from the Custom's writing requirement); FRANÇOIS TERRÉ & PHILLIPE SIMLER, *DROIT CIVIL—LES BIENS* § 830, at 677 n.2 (5th ed. 1998) (stating that destination's original foundation is the Custom of Paris).

45. Compare PLANIOL & RIPERT, *supra* note 44, §§ 966, 968, at 946–48 (asserting that the common owner must intend to create a servitude and that such intent must be evidenced by exterior signs), with BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 846 (arguing that the creation of predial servitudes by destination of the owner is founded only on a “tacit convention” between subsequent owners that the former owner's state of affairs would remain in place).

46. See discussion *infra* Part III.A.1–4.

47. See discussion *infra* Part III.B.1–3.

48. 8 FRANÇOIS LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS* § 172, at 204 (2d ed. 1876).

49. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845 n.1.

50. See, e.g., PLANIOL & RIPERT, *supra* note 44, § 966, at 946; BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 844–45; MAZEAUD ET AL., *supra* note 42, § 1721, at 410.

implicitly agree that an apparent predial servitude will be created.⁵¹ Under tacit agreement theory, one simply looks to whether an apparent burden existed between two estates at the moment that they ceased to be owned by the same person.⁵² In that case, the parties will be *deemed by law* to have tacitly agreed that the situation will continue to remain in effect.⁵³ The tacit agreement thus serves as a form of unwritten title to a conventional predial servitude.⁵⁴

D. Evolution of Louisiana's Destination Regime

The Louisiana Legislature extensively revised the Code articles governing predial servitudes in 1977.⁵⁵ Current Civil Code article 741 is based on a combination of articles 649, 767, 768, and 769 of the Civil Code of 1870.⁵⁶ Until the 1977 revision, Louisiana's articles on destination were translations of the counterpart articles in the Napoleonic Code, which remain in effect in France.⁵⁷

Article 767 of the 1870 Code equated destination to title with respect to continuous and apparent servitudes.⁵⁸ Although article

51. LAURENT, *supra* note 48, § 172, at 204.

52. 3 CHARLES AUBRY & FRÉDÉRIC CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS § 252, at 118 (6th ed. 1938).

53. LAURENT, *supra* note 48, § 172, at 203–04.

54. PLANIOL & RIPERT, *supra* note 44, § 966, at 946.

55. 1977 La. Acts 1309.

56. LA. CIV. CODE art. 741 cmt. a (2011). Article 649 of the Code of 1870 simply referenced the other articles and will not be discussed here. *See* 2008 COMPILED EDITION OF CIVIL CODES OF LOUISIANA 640–42 (A. N. Yiannopoulos ed., 2008) [hereinafter 2008 COMPILED CODES]. Article 769 of the 1870 Code was a translation of article 694 of the *Code Napoleon*. *Id.* It was adopted in the second operative paragraph of current article 741. *Id.* However, article 741 differs because it now allows both apparent and nonapparent servitudes to be created by destination. *Id.* Furthermore, article 741 now simply states that an apparent servitude “comes into existence of right” unless there is an express provision otherwise. *Id.*

57. *See* 2008 COMPILED CODES, *supra* note 56, at 640–42; *see also* CODE CIVIL [C. CIV.] arts. 692–694 (Fr.).

58. 2008 COMPILED CODES, *supra* note 56, at 640. The 1977 revision did away with the distinction between continuous and discontinuous servitudes. Yiannopoulos, *supra* note 4, at 75. Continuous servitudes were “those whose use may be continual, with or without the act of man,” such as the rights of aqueduct, view, and drain. *Acadiana-Vermilion Rice Irrigating Co. v. Broussard*, 175 So. 2d 856, 859 (La. Ct. App. 3d 1965). Discontinuous servitudes required an act of man to be used, such as a right of passage or drawing water. *Id.* In Louisiana, both continuous and discontinuous servitudes may now be created by destination. Yiannopoulos, *supra* note 4, at 75. In France, the distinction remains relevant because only continuous servitudes may be created by destination. C. CIV. art. 692 (Fr.).

767 did not mention intent, its source provisions in the Louisiana Civil Codes of 1808 and 1825 did.⁵⁹ Article 763 of the Louisiana Civil Code of 1825 stated: “[T]he use which the owner has intentionally established on a particular part of his property in favour [sic] of another part is equal to title, with respect to perpetual and apparent servitudes thereon.”⁶⁰ The 1808 Code article was closer to that of the Napoleonic Code, providing: “The intention of the father of the family is equal to title, with respect to perpetual and apparent services.”⁶¹ The Legislature omitted the word *intentionally* from article 767 in the 1870 Code.⁶² After the 1870 revision, the only mention of intent appeared in article 768.⁶³ That article provided for a presumption of the common owner’s intent.⁶⁴ Article 768 read: “Such intention is never presumed till [sic] it has been proved that both estates, now divided, belonged to the same owner, and that it was by him that the things have been placed in the situation from which the servitudes result.”⁶⁵

Articles 767 and 768 of the Code of 1870 are both rooted in the English translations of the Napoleonic Code.⁶⁶ A comparison of the English and French versions of the articles reveals that the English versions were, in fact, *mistranslations*.⁶⁷ The word *intent* does not appear in either article of the Napoleonic Code.⁶⁸ Article 692 of the Napoleonic Code stated: “Destination of the father of the family is equal to title.”⁶⁹ The English version of article 692 mistranslated this clause as, “The intention of the father of the family is equal to title.”⁷⁰ Similarly, the proper translation of the French version of article 693 reads, “There is only destination of the father of the family when it is proven,” but the English version states, “The intention of the father of the family is never presumed till [sic] it has been proved.”⁷¹ Accordingly, the word *intent* should probably have never been included in Louisiana’s destination regime because the French Code never provided for a presumption of intent.

59. See 2008 COMPILED CODES, *supra* note 56, at 640.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 641.

64. *Id.*

65. *Id.*

66. *Id.* at 640–41.

67. See *id.*; see also C. CIV. arts. 692–693 (Fr.).

68. See 2008 COMPILED CODES, *supra* note 56, at 640–41; see also C. CIV. arts. 692–693 (Fr.).

69. 2008 COMPILED CODES, *supra* note 56, at 640; C. CIV. art. 692 (Fr.).

70. 2008 COMPILED CODES, *supra* note 56, at 640; C. CIV. art. 692 (Fr.).

71. 2008 COMPILED CODES, *supra* note 56, at 641; C. CIV. art. 693 (Fr.).

The mistranslated intent presumption of article 768 was not included in current article 741.⁷² However, the omission was not due to the mistranslation; the Louisiana Legislature chose not to include the intent presumption “because it relates to matters of proof.”⁷³ The Legislature explained that “[i]t should be evident that there is no destination under Article 741 unless there is proof that the two estates belonged to the same owner and that it was he who established the relationship giving rise to the servitude.”⁷⁴ In a 1982 law review article regarding the revision, Professor Yiannopoulos stated, “The intent to establish a destination is no longer presumed; the court is free to draw the appropriate inferences from proof that the two estates belonged in the past to the same owner and that he erected the exterior signs of the servitude.”⁷⁵

After the Legislature chose to exclude the intent presumption from article 741, there is no mention of intent in the Louisiana Civil Code’s destination regime.⁷⁶ It is unclear whether proof of intent is still required, whether the question of intent was done away with entirely, or whether intent should have ever been mentioned in the Civil Code in the first place. Accordingly, it is questionable whether the drafters of article 741 meant to allow courts to inquire into the subjective intent of a party in a destination case. The exclusion of article 768’s intent presumption has proved troublesome in that it arguably created a vacuum that allowed Louisiana courts to require plaintiffs to provide evidence of intent.⁷⁷

II. THE INTENT REQUIREMENT IN LOUISIANA

Despite article 741’s silence on the issue of the common owner’s intent, the Louisiana Fourth Circuit Court of Appeal requires evidence to that effect when a party claims destination.⁷⁸ Recently, in *Phipps v. Schupp*, the Louisiana Supreme Court implicitly adopted the intent requirement, although it questioned the

72. LA. CIV. CODE art. 741 cmt. b (2011).

73. *Id.*; 1977 La. Acts 1335.

74. LA. CIV. CODE art. 741 cmt. b; 1977 La. Acts 1335.

75. Yiannopoulos, *supra* note 4, at 79 n.119.

76. LA CIV. CODE art. 741.

77. See discussion *infra* Part II.B.

78. See 730 Bienville Partners, Ltd. v. First Nat’l Bank of Commerce, 596 So. 2d 836, 839–40 (La. Ct. App. 4th 1992); *Phipps v. Schupp*, 19 So. 3d 38, 41 (La. Ct. App. 4th 2009), *vacated*, 45 So. 3d 593 (La. 2010).

fourth circuit's factual findings and reversed the decision.⁷⁹ The fourth circuit's intent requirement is rooted in a familiar source.

A. The Fountainhead: Professor Yiannopoulos

Professor Yiannopoulos laid the groundwork for the fourth circuit's intent requirement in his article discussing the 1977 codal revision.⁸⁰ His article specifically focused on how the revision affected the law regarding conventional predial servitudes created by acquisitive prescription and destination.⁸¹ Professor Yiannopoulos concluded that, aside from a few significant alterations, the law remained essentially unchanged.⁸² He argued that the revised articles continue to relate to older versions of the Louisiana Civil Code and to the corresponding provisions of the French Civil Code.⁸³ Therefore, "prior Louisiana jurisprudence and doctrine, as well as French jurisprudence and doctrine, continue to be relevant for the interpretation and application of the new legislation."⁸⁴

In the section of his article discussing destination, Professor Yiannopoulos wrote that the creation of such a servitude is based on a "tacit agreement" theory.⁸⁵ Adhering to French doctrinal authority, Professor Yiannopoulos wrote that "[t]he law simply recognizes and enforces this tacit agreement that is the equivalent of title."⁸⁶ Professor Yiannopoulos found that tacit agreement theory is based on historical precedent and accounts for the French doctrinal and jurisprudential interpretations of the French Civil Code articles on destination.⁸⁷

Professor Yiannopoulos wrote that, under article 741, in the absence of a formal recordation of destination, an apparent predial servitude is established by exterior signs on either the dominant or servient estate.⁸⁸ Although the Louisiana Legislature dropped the

79. *Phipps v. Schupp*, 45 So. 3d 593, 598–602 (La. 2010).

80. Yiannopoulos, *supra* note 4.

81. *Id.*

82. *Id.* at 82. Yiannopoulos concluded that the biggest change in the law was the abolishment of the distinction between continuous and discontinuous servitudes. *Id.* at 83. This change enabled discontinuous servitudes, including rights of passage, to be acquired by acquisitive prescription and by destination of the owner. *Id.* Another important change in the law is that nonapparent servitudes can now be acquired by destination of the owner if the common owner files a declaration of destination. *Id.*

83. *Id.* at 82.

84. *Id.* at 82–83.

85. *See id.* at 74; *see also* discussion *supra* Part I.C.

86. Yiannopoulos, *supra* note 4, at 74.

87. *Id.*

88. *Id.* at 78.

express requirement of “an apparent sign of servitude” in the 1977 revision, there was no change in the law.⁸⁹ Current Civil Code article 741 clearly states that only an apparent predial servitude “comes into existence of right” at the moment the two estates cease to belong to the same owner.⁹⁰ By definition, apparent predial servitudes are evidenced by exterior works, signs, or constructions;⁹¹ therefore, according to Professor Yiannopoulos, the omission of the “apparent sign of servitude” language was immaterial because the redactors contemplated the same situation.⁹²

However, Professor Yiannopoulos did not end his discussion there. He stated:

According to French doctrine and jurisprudence that ought to be pertinent for Louisiana, the exterior sign must be characteristic of the particular kind of servitude that the owner of the dominant estate claims and it must also be indicative of the intent of the former owner to establish the servitude.⁹³

This sentence was of major importance to the Fourth Circuit Court of Appeal when it later applied the intent requirement.⁹⁴ Although Professor Yiannopoulos downplayed the significance of the exclusion of former article 768’s intent presumption,⁹⁵ the fourth circuit appeared to take advantage of it.

B. The Application: Bienville

Ten years after Professor Yiannopoulos’s article, the Louisiana Fourth Circuit Court of Appeal accepted his theories in a seminal destination case: *730 Bienville Partners v. First National Bank of*

89. *Id.*

90. *Id.*; LA. CIV. CODE art. 741 (2011).

91. LA. CIV. CODE art. 707.

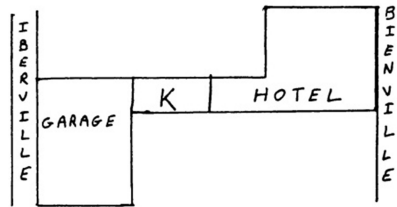
92. Yiannopoulos, *supra* note 4, at 79.

93. *Id.* Yiannopoulos elaborated further on what evidence of intent is sufficient to trigger destination. *Id.* He stated that an exterior sign indicative of a mere *personal* convenience to the owner does not create a predial servitude by destination. *Id.* Yiannopoulos also asserted that personal action of the owner is not always required for destination to apply; in some cases, the works may be made by the owner’s agent or other representative. *Id.* According to Yiannopoulos, if the common owner maintains these works, destination applies at separation of ownership. *Id.* However, lessees, tenant farmers, and usufructuaries are not agents and therefore cannot make works capable of becoming a predial servitude by destination—even if the common owner maintains the works. *Id.*

94. See discussion *infra* Part II.B.

95. Professor Yiannopoulos relegated his comments on the deletion to a footnote. Yiannopoulos, *supra* note 4, at 79 n.119.

Commerce.⁹⁶ Having been “free[d] to draw the appropriate inferences”⁹⁷ regarding the common owner’s intent, the court declined to find such intent in *Bienville*.⁹⁸ The facts of the case occurred in the New Orleans French Quarter.⁹⁹ The property in question consisted of three contiguous tracts between Iberville and Bienville streets—the St. Louis Hotel, Parcel K, and the Solari parking garage.¹⁰⁰



In 1980, Royal Bienville Investors, Ltd. (Royal)¹⁰¹ purchased all three lots. Royal went bankrupt in 1986 and transferred its ownership interest in the garage and Parcel K.¹⁰² However, Royal retained its ownership interest in the hotel.¹⁰³ Royal thereafter leased spaces for hotel guests in the garage.¹⁰⁴ First National Bank of Commerce (First NBC) was granted a mortgage on the garage in 1990.¹⁰⁵ Royal ultimately transferred its interest in the hotel to 730 Bienville Partners, Ltd. (730 Bienville)¹⁰⁶ in 1990.¹⁰⁷

The dispute arose in December 1990 when the hotel terminated its parking agreement with the garage.¹⁰⁸ Westminster Parking, which operated the garage, then informed 730 Bienville of its intent to close a doorway between Parcel K and the garage, thereby

96. *Id.*

97. Yiannopoulos, *supra* note 4, at 79 n.119.

98. *Bienville*, 596 So. 2d at 840.

99. *See id.* at 837.

100. *Id.* The diagram below appears in the original reported version of the *Bienville* case.

101. *Id.* In 1984, Royal Bienville Investors transferred the three lots to Royal St. Charles, Ltd., a separate partnership *in commendam*, in exchange for a 74% limited partnership interest. *Id.* at 838. For purposes of simplicity, both business entities will be referred to as “Royal.”

102. *Id.* at 838.

103. *Id.*

104. *Id.*

105. *Id.*

106. 730 Bienville Partners, Ltd., yet another partnership *in commendam*, was the managing general partner of Royal St. Charles, Ltd. *Id.*

107. *Id.*

108. *Id.*

denying passage from the hotel through the garage to Iberville Street.¹⁰⁹ First NBC subsequently directed Westminster Parking to block the doorway in early January.¹¹⁰

Next, 730 Bienville sued First NBC to prevent the doorway's closure.¹¹¹ It argued that an apparent predial servitude of passage via the doorway existed in favor of the hotel.¹¹² The thrust of 730 Bienville's claim was that the servitude was created by destination in 1986 when the three lots ceased to belong to Royal alone.¹¹³ The trial court disagreed.¹¹⁴ It ruled that no servitude was created by destination because hotel employees had used the doorway pursuant to a lease agreement and that the use of property pursuant to a lease does not create a servitude.¹¹⁵ The fourth circuit affirmed and held that 730 Bienville failed to prove that Royal intended to establish a servitude of passage to and from Iberville street.¹¹⁶

The Fourth Circuit relied solely on Professor Yiannopoulos's article in its reasoning.¹¹⁷ First, the court agreed with Professor Yiannopoulos that destination is based on tacit agreement theory.¹¹⁸ Second, the court, paraphrasing Professor Yiannopoulos, held that "the common owner must intend to create an apparent servitude and such intent must be evidenced by exterior signs which are consistent with the nature and extent of the servitude claimed."¹¹⁹ The *Bienville* Court held that the exterior signs in the instant case were not enough evidence to support Royal's intent to use the garage as a servitude of passage.¹²⁰ According to the court, the only exterior signs of a servitude of passage were located *inside* the garage, near the door leading to Parcel K.¹²¹ In the court's view, because 730 Bienville failed to prove the existence of exterior signs on Iberville

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The hotel would be the dominant estate and the garage the servient.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 840.

117. *See id.* at 839.

118. *Id.*

119. *Id.*

120. *Id.* at 840.

121. A survey taken at the time common ownership ceased had "Entry to Hotel" written in the area of Parcel K. *Id.* at 839. The court held that this evidence did not prove an intent to create a servitude to Iberville but merely showed that the hotel could be entered from the garage. *Id.* Photos from the time common ownership ceased showed a sign reading "The Saint Louis Hotel" above the door inside the garage. *Id.* On the Parcel K side of the door, a sign read "To Parking" and "Exit." *Id.* The garage wall near the door was painted to match the décor of the doorway. *Id.*

Street directing foot traffic toward the hotel, 730 Bienville failed to prove that Royal intended to create a passageway through the garage.¹²² The court further reasoned that in order for hotel patrons to use the doorway between the garage and Parcel K, they were required to park their cars in the garage first.¹²³ This condition, according to the court, indicated that Royal did not intend that hotel guests and employees would be able to use the garage as a pathway to Iberville Street.¹²⁴

C. The Acceptance: Phipps

The *Bienville* decision provided the basis for a similar result in the recent Louisiana Fourth Circuit Court of Appeal case of *Phipps v. Schupp*.¹²⁵ Again, the court held that destination did not apply because the plaintiff failed to provide sufficient evidence of the common owner's intent to create a predial servitude.¹²⁶ This time, however, the Louisiana Supreme Court took up the intent issue and reached the opposite conclusion from that of the lower courts.¹²⁷ Nonetheless, the Louisiana Supreme Court employed the fourth circuit's intent requirement in its analysis, thereby implicitly adopting the doctrine.

The *Phipps* dispute took place in the Uptown neighborhood of New Orleans.¹²⁸ Before 1978, the two estates at issue constituted only one estate.¹²⁹ Its boundaries consisted of Exposition Boulevard–Audubon Park¹³⁰ to the west, Patton Street to the north, and other residential properties to the south and east.¹³¹ In 1978, the owner split his lot into two separate properties: 541 and 543 Exposition Boulevard.¹³² Lot 541 thereafter had no direct access to a usable public road.¹³³ In 1978, the owner sold 541, thereby enclosing the

122. *Id.* at 840.

123. *Id.* Interestingly, the court also examined evidence of the parking arrangement after unity of ownership ceased. *Id.* at 839. In doing so, the court appeared to miss 730 Bienville's argument completely because a predial servitude of destination is established at the *moment* of separation of ownership, not afterwards. *See* LA. CIV. CODE art. 741 (2011).

124. *Bienville*, 596 So. 2d at 839.

125. *Phipps v. Schupp*, 19 So. 3d 38 (La. Ct. App. 4th 2009), *vacated*, 45 So. 3d 593 (La. 2010).

126. *Id.* at 43.

127. *See Phipps v. Schupp*, 45 So. 3d 593 (La. 2010).

128. *See id.* at 595.

129. *Id.*

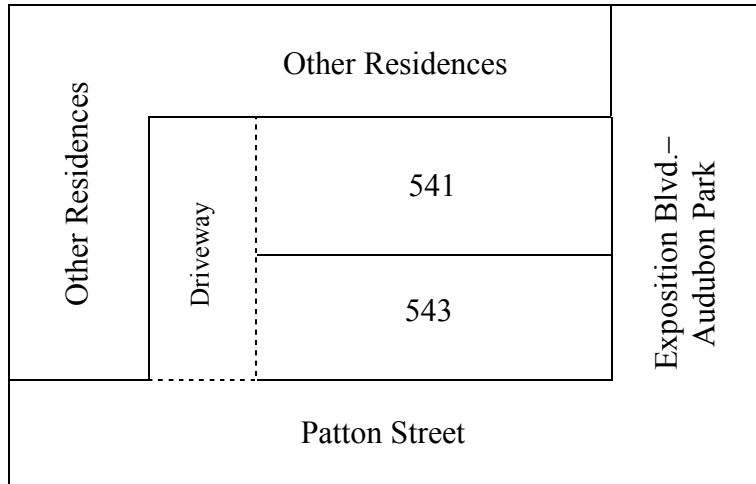
130. Exposition Boulevard is a walkway not designated for vehicular use. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

estate.¹³⁴ Before the sale, the owner created a driveway running over 543 so that 541 would have access to Patton Street.¹³⁵



Plaintiff Roger Phipps bought 541 in 1982.¹³⁶ He used the driveway as a vehicular passageway for over 20 years.¹³⁷ In 2003, defendants Cynthia Schupp and Roland Cutrer, the owners of 543, built a carport enclosure in their backyard that partially obstructed the driveway so that vehicular passage to 541 became impossible.¹³⁸ Phipps continued to use the unobstructed portion as a walkway to and from Patton Street.¹³⁹ In 2006, the defendants built a fence over the unobstructed portion, thereby completely blocking off the walkway.¹⁴⁰

Perhaps having exhausted any attempts at neighborly compromise, Phipps filed a possessory action seeking to have the court recognize a right of passage and order the defendants to remove their obstructions.¹⁴¹ Phipps argued that the presence of the driveway when the common owner first sold 541 in 1978 gave rise to a predial servitude by destination.¹⁴² The district court disagreed and granted summary judgment in favor of the defendants.¹⁴³ The

134. *Id.*

135. *Id.* The following diagram was created by the author of this Comment.

136. *Id.*

137. *Id.* at 595–96.

138. *Id.* at 596.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

court relied on the “intent” language of *Bienville* and held that Phipps had failed to demonstrate intent evidenced by exterior signs because “[t]he mere existence and use of a concrete driveway does not constitute a predial servitude.”¹⁴⁴

On appeal, the fourth circuit extensively reviewed its reasoning in *Bienville* and affirmed.¹⁴⁵ The court concluded that historical use of a particular pathway by the common owner cannot serve as proof of intent; there must also be “exterior signs” demonstrating the nature and extent of the servitude claimed.¹⁴⁶ Furthermore, the court held that existence of a contested pathway cannot alone serve as proof of intent.¹⁴⁷ Therefore, because Phipps could only point to his own use of the driveway and its existence when the common owner sold 541, the court found that his destination claim lacked merit.¹⁴⁸

Because the case was decided on summary judgment, Phipps argued on appeal to the supreme court that material facts existed as to the evidence of the common owner’s intention.¹⁴⁹ The supreme court agreed and remanded the case.¹⁵⁰ The court distinguished *Bienville*, reasoning that, in that case, “there were no exterior signs indicating an existence of an apparent servitude.”¹⁵¹ All signs of a servitude in *Bienville* were located inside the garage and therefore were not “apparent” under the meaning of article 707.¹⁵² By contrast, the court reasoned that the driveway in *Phipps* could conceivably constitute a perceivable exterior sign under that article.¹⁵³ After all, according to the court, the driveway visibly extended from Phipps’s garage through the defendants’ backyard.¹⁵⁴

144. *Id.* It is unclear whether the district court meant to say an *apparent* predial servitude.

145. *Phipps v. Schupp*, 19 So. 3d 38, 42–43 (La. Ct. App. 4th 2009), *vacated*, 45 So. 3d 593 (La. 2010).

146. *Id.* at 43.

147. *Id.*

148. *Id.*

149. *Phipps v. Schupp*, 45 So. 3d 593, 596–97 (La. 2010). Phipps’s alleged facts were: (1) The driveway existed at the time 531 was sold; (2) there was no express provision to the contrary for the use of the servitude; and (3) he had a key to the driveway’s gate. *Id.*

150. *Id.* at 603. Somewhat surprisingly, the plaintiffs did not argue that a *legal* servitude of passage was created when the estate became enclosed, which would have done away with any destination claim. *See* LA. CIV. CODE arts. 689–695 (2011). The court supplied this argument on its own. *Phipps*, 45 So. 3d at 598.

151. *Phipps*, 45 So. 3d at 599–601.

152. *Id.* at 600; LA. CIV. CODE art. 707.

153. *Phipps*, 45 So. 3d at 600.

154. *Id.*

Interestingly, the Louisiana Supreme Court noted specific evidence for establishing the common owner's intent in *Phipps*. First, Phipps had a key to the driveway's gate.¹⁵⁵ The court reasoned that if the key had been passed down from the common owner, then the owner must have intended the driveway to serve 541.¹⁵⁶ Secondly, the court stated that because the common owner needed to get approval from the city planning commission to subdivide his lots, he was required to abide by city planning regulations that required all parcels of land in a subdivision to have access to a public street.¹⁵⁷ In the court's view, because the commission approved of the subdivision, the common owner must have complied with the commission's regulations.¹⁵⁸ To the Louisiana Supreme Court, this suggested that the common owner must have intended 541 to have access to a public road.¹⁵⁹

D. The Extension: Post-Phipps Application of the Intent Requirement

Despite its disagreement with the fourth circuit's findings in *Phipps*, the supreme court did not do away with the intent requirement—to the contrary, it implicitly adopted the doctrine.¹⁶⁰ The court merely distinguished *Bienville* from *Phipps*; it did not disagree with *Bienville*'s reasoning.¹⁶¹ Furthermore, the *Phipps* court did not definitively resolve what exterior signs are sufficient to prove intent but only suggested what *may* be sufficient.¹⁶² While the court seemingly held that the existence of the driveway itself was an exterior sign evidencing intent, in actuality the court merely stated that this idea was “conceivable.”¹⁶³ After *Phipps*, the definition of “sufficient proof of intent” remains nebulous.

Not only is the intent requirement still a viable doctrine, it is now the interpretation of Louisiana's highest court. Therefore, lower state courts will look to *Phipps* as a guide when considering a destination case and will apply the intent requirement accordingly. For the reasons discussed at length below, the supreme court's

155. *Id.* at 601.

156. *Id.*

157. *Id.* at 601–02.

158. *Id.*

159. *Id.*

160. *Cf.* 1 PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 3:40, at 127–28 (2d ed. 2011) (arguing that the supreme court, in *Phipps*, effectively limited the “problematic” language of *Bienville*).

161. *Phipps*, 45 So. 3d at 599–601.

162. *See id.* at 598–603.

163. *Id.* at 600.

adoption of the requirement will obfuscate lower courts' analyses of destination cases.¹⁶⁴ The intent requirement should therefore be abandoned in favor of a simpler, more objective standard in order to lessen a court's burden when faced with a destination issue.¹⁶⁵

III. *LE DÉBAT*:¹⁶⁶ THE VARIANCE OF FRENCH DOCTRINE ON
DESTINATION

In his article, Professor Yiannopoulos asserted that because French doctrine and jurisprudence subscribe to the intent requirement, Louisiana law should follow suit.¹⁶⁷ Admittedly, destination is a distinctly French civilian concept, and Louisiana's codal regime is inarguably based on that of the French.¹⁶⁸ Professor Yiannopoulos is thus correct in stating that the French "ought to be pertinent" in this area.¹⁶⁹ By the same token, a review of French doctrine reveals varying treatments of destination.¹⁷⁰ If Louisiana law is to base the intent requirement on the French, as Professor Yiannopoulos argues,¹⁷¹ then that basis is questionable when one considers their disparate approaches.

Professor Yiannopoulos's argument that French doctrine supports the intent requirement especially loses force when one takes into account that he relied almost exclusively on Planiol.¹⁷² Several French commentators view destination quite differently than Planiol does.¹⁷³ Perhaps their analyses "ought to be pertinent"¹⁷⁴ as well. The following analysis of original French

164. See discussion *infra* Parts III, IV.

165. See discussion *infra* Part IV.B.

166. "The Debate."

167. Yiannopoulos, *supra* note 4, at 79.

168. See discussion *supra* Part II.C–D.

169. Yiannopoulos, *supra* note 4, at 79.

170. See discussion *infra* Part III.A–B; see also discussion *supra* Part I.C.

171. Yiannopoulos, *supra* note 4, at 79.

172. It appears that Professor Yiannopoulos translated Planiol in his description of the intent requirement. Compare Yiannopoulos, *supra* note 4, at 74–75, with PLANIOL & RIPERT, *supra* note 44, § 966, at 946. Professor Yiannopoulos and Planiol also cite the same French jurisprudence. Compare Yiannopoulos, *supra* note 4, at 79 nn.118–19, with PLANIOL & RIPERT, *supra* note 44, § 968, at 947–48.

173. Compare PLANIOL & RIPERT, *supra* note 44, §§ 966, 968, at 946–48 (asserting that the common owner must intend to create a servitude and that such intent must be evidenced by exterior signs), with BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 846 (arguing that the creation of predial servitudes by destination of the owner is founded only on a "tacit convention" between subsequent owners that the former owner's state of affairs would remain in place).

174. Yiannopoulos, *supra* note 4, at 79.

sources illustrates that French doctrine is split on whether the common owner's intent has any relevance or whether destination is based only on tacit agreement theory.

A. The "Intent Camp"

Some writers subscribe to the theory that, in order for destination to apply, the apparent works must indicate that the common owner had the *will* to establish a servitude.¹⁷⁵ This "intent camp" believes that the reason that the law recognizes destination is to respect the common owner's wishes.¹⁷⁶ The most eminent of the "intent scholars" is Planiol, as evidenced by Professor Yiannopoulos's strong reliance on Planiol's explanation of destination.¹⁷⁷ Other writers in the intent camp include Pardessus, Toullier, and Henri Mazeaud.¹⁷⁸

1. Planiol

Planiol begins his discussion of destination by defining it as "the act by which a person establishes between two estates which belong to him (or between two parts of a same estate) a situation which would constitute a servitude if the estates belonged to two different owners."¹⁷⁹ When the estates cease to belong to the same owner, the servitude is "born" without title.¹⁸⁰ Planiol then endorses tacit agreement theory as the conceptual justification for why the law grants the equivalent of title in these situations.¹⁸¹

However, Planiol goes on to state that tacit agreement theory accounts for the jurisprudential requirement that the common owner have the intention of establishing a servitude.¹⁸² According to Planiol, there must exist on the dominant or servient estate an "apparent state of fact clearly characteristic of the servitude claimed, and revealing on the part of the common owner the will to establish, in a definitive and permanent manner, the subjugation of one of his estates to the other."¹⁸³ Works made for the personal convenience of

175. See discussion *infra* Part III.A.1-4.

176. See discussion *infra* Part III.A.1-4.

177. See *supra* note 172 and accompanying text.

178. See discussion *infra* Part III.A.2-4.

179. PLANIOL & RIPERT, *supra* note 44, § 966, at 945-46.

180. *Id.* at 946.

181. *Id.* ("[Destination] is, in effect, founded on the supposition that there was a tacit convention between the parties that the state of fact established by the [common owner] would be maintained, and the law recognizes in this a means of establishing the existence of an agreement.").

182. *Id.*

183. PLANIOL & RIPERT, *supra* note 44, § 968, at 947.

the owner therefore are not indicative of such intent.¹⁸⁴ The state of fact must also exist at the moment of separation because the signs must support the idea of a tacit convention between the parties that a servitude exists.¹⁸⁵

2. *Pardessus*

Pardessus stresses that permanent exterior signs of an apparent servitude are determinative in destination cases.¹⁸⁶ He writes that “without such signs, one would not be able to infer a will to create a true subjugation of one immovable to another.”¹⁸⁷ In Pardessus’s view, the exterior signs are the way to determine the common owner’s will.¹⁸⁸ However, Pardessus’s theory focuses more on the signs of the servitude than on what the common owner was, in fact, thinking.¹⁸⁹ Although not expressly stating so, the important determination under Pardessus’s theory is whether *the parties* viewed the permanent signs as obviously indicative of an apparent servitude. Thus, although Pardessus does speak of the common owner’s intent, his theory is actually aimed at a determination of whether the servitude was apparent to the parties.

3. *Toullier*

Toullier believes that “it is from [the] former condition [of the estates], such as it existed while the two estates were in the same hands, that destination results, because this condition manifests his will.”¹⁹⁰ He explains: “[O]ne perceives destination by the disposition and arrangements that the owner made on his houses or other estates, either for their utility, or to satisfy his fancy and taste.”¹⁹¹ Toullier’s determination requires strong evidence of the common owner’s actual intent—his “fancy and taste”—because his theory focuses more on what the common owner was thinking than the physical situation between the estates.¹⁹² Under Toullier’s theory, the physical signs of the servitude do not bear on the state of

184. *Id.* at 948.

185. *Id.*

186. *See* 2 JEAN MARIE PARDESSUS, *TRAITÉ DES SERVITUDES* § 288, at 119 (8th ed. 1838).

187. *Id.*

188. *Id.*

189. *Id.*

190. 2 CHARLES BONAVENTURE, MARIE TOULLIER & J.B. DUVERGIER, *LE DROIT CIVIL FRANÇAIS* § 606, at 275 (6th ed. 1846).

191. *Id.*

192. *Id.*

mind of the parties at separation of ownership but simply on what the common owner desired to do on his property.¹⁹³ Toullier thus believes that the parties are not agreeing to continue the arrangement between the estates but to honor the common owner's intentions.¹⁹⁴

4. H. Mazeaud

Henri Mazeaud's theoretical basis for destination is similar to Planiol's but differs slightly.¹⁹⁵ According to Mazeaud, the type of works that a common owner has made on his estate is irrelevant.¹⁹⁶ The works must only "materialize the intention to subjugate one part of his estate to the profit of another."¹⁹⁷ Mazeaud believes that the materialization of that intention gives rise to the idea of a tacit agreement between the parties that the existing situation will become a predial servitude.¹⁹⁸

Thus, Mazeaud's explanation of destination does require an element of the common owner's intent, but it differs from Planiol's explanation because the works "materialize" the intention. The important element of Mazeaud's theory is not the common owner's intent but the works' materialization of an intention. The word *materialize* implies that the intention is obvious to the parties at the moment that ownership is severed.¹⁹⁹ Therefore, Mazeaud's "materialization" of intention is actually another way of saying that the servitude is *apparent*.

B. The "Pure Tacit Agreement Camp"

French doctrine's general acceptance of tacit agreement theory likely results from a desire to conceptually justify destination as a means of creating a conventional predial servitude. Under tacit agreement theory, the implied agreement itself is considered the title.²⁰⁰ The tacit agreement *becomes* the necessary "convention." Thus, tacit agreement conceptually explains how it is possible for

193. *Id.*

194. *Id.*

195. MAZEAUD ET AL., *supra* note 42, § 1721, at 408.

196. *Id.*

197. *Id.*

198. *Id.*

199. This idea is similar to the "presumption" of intention under article 768 of the Louisiana Civil Code. See discussion *supra* Part I.D.

200. See PLANIOL & RIPERT, *supra* note 44, § 966, at 946; Yiannopoulos, *supra* note 4, at 74.

destination to create a conventional predial servitude even though there was no actual agreement between the parties.²⁰¹

On the other hand, the theory that the common owner must intend to create a servitude does not explain how destination creates a conventional servitude despite the absence of an agreement.²⁰² The intent theory presupposes that a servitude was created by means of a unilateral act—the will of the common owner.²⁰³ However, it is conceptually impossible for a conventional servitude to be created this way because the common owner cannot “agree” with himself to create a conventional servitude.²⁰⁴ Therefore, destination cannot be thought of as a continuation of the common owner’s will because his will cannot create a servitude for the parties to continue.²⁰⁵

Tacit agreement theory solves this problem by granting an implied title to the servitude at the moment that *two* people own the estates.²⁰⁶ Several French writers strongly adhere to that theory’s theoretical advantages and couch destination *only* in terms of a tacit agreement.²⁰⁷ These writers in the “pure tacit agreement camp”—including Laurent, Aubry and Rau, and Baudry-Lacantinerie—either reject the idea of the common owner’s intent as irrelevant or neglect to mention it at all.

1. Laurent

In Laurent’s view, destination is simply a manner of granting title to a servitude by recognizing a tacit agreement between the parties.²⁰⁸ Laurent states that “the servitude is born, not of the exclusive will of the owner who destined one of his estates to the service of the other, but of the combination of wills of those who took part in the contract which operated to divide the estates.”²⁰⁹ Laurent views this explanation as especially reasonable in cases of partition, where “the proprietor being dead, his will is for nothing in establishing the servitude; it can only be shown by the destination to which he gave the estates.”²¹⁰

201. LAURENT, *supra* note 48, § 172, at 204.

202. *Id.*

203. *Id.*

204. LA. CIV. CODE art. 646 (2011). This provision is an application of the Roman maxim *nemini res sua servit* (no one has a right of servitude in his own property). *Id.* art. 646 cmt. f.

205. LAURENT, *supra* note 48, § 172, at 204.

206. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

207. See discussion *infra* Part III.B.1–3.

208. LAURENT, *supra* note 48, § 172, at 204.

209. *Id.*

210. *Id.*

Thus, Laurent views destination only as a matter involving the parties at severance of ownership. Laurent is correct that the common owner's will cannot be ascertained if he is dead, and, therefore, only the exterior signs can indicate the existence of a servitude. But the signs do not relate to the owner's will—they relate only to the tacit “combination of wills” of the parties at the time that ownership of the estates is divided.²¹¹ Although especially relevant in partition cases, Laurent's “combination of wills” theory is also useful for instances in which the common owner is a party to the separation of ownership, such as when he sells part of his estate to another. In such a case, according to Laurent, both parties' intentions regarding the servitude should be inferred from the situation existing at the time they contracted.²¹² For example, the seller should not be able to claim later that he never intended to create the servitude, thereby unilaterally depriving the buyer of its use, when the signs clearly suggested otherwise. Laurent's theory avoids such inequitable results.

2. *Aubry and Rau*

Aubry and Rau support tacit agreement theory as the basis of destination by implication.²¹³ They make no mention of the common owner's will.²¹⁴ Instead, they propose that one who invokes destination must simply produce his title to the estate and show that he is the successor of the person who created the preexisting situation.²¹⁵ Although not expressly rejecting the jurisprudential intent requirement, Aubry and Rau's neglect of the subject is noteworthy.

Aubry and Rau's explanation of destination truly follows the letter of the law in that the French Civil Code articles on destination provide for the exact same process.²¹⁶ Under the French Civil Code, the intent to create a servitude is *implied* when a party proves that the two estates belonged at one time to the same person and that it was that person who created the works.²¹⁷ Louisiana Civil Code article 741 produces the same result. The first paragraph of article 741 provides that destination can apply only when a single owner establishes a relationship between two estates.²¹⁸ The second

211. *Id.*

212. *Id.*

213. AUBRY & RAU, *supra* note 52, § 252, at 118.

214. *Id.*

215. *Id.* at 119.

216. C. CIV. arts. 692–694 (Fr.).

217. *Id.* art. 693.

218. LA. CIV. CODE art. 741 (2011).

paragraph of the article states that an apparent servitude is created “at the moment the two estates cease to belong to the same owner.”²¹⁹ Therefore, if a party proves that a common owner created the situation giving rise to an apparent servitude, and the party is the common owner’s successor, then destination applies.

3. *Baudry-Lacantinerie*

Baudry-Lacantinerie is perhaps the strongest critic of a unilateral intent element. In the section of his property treatise covering destination, he writes:

This mode of establishing servitudes is not based on the unilateral will of the owner of the two estates, on the sole intention of the [owner] at the moment he created the state of things which, later on, will be constitutive of the servitude; the foundation of this mode is on a tacit agreement relative to the maintenance of the state of things anterior to the creation of the servitude, to the effect that the consensual element only appears at the moment of division of the estates.²²⁰

Thus, to Baudry-Lacantinerie, the common owner’s intent is irrelevant. The determinative factor, according to Baudry-Lacantinerie, is whether the burden was apparent.²²¹ Due to the obvious burden on one of the estates, “the parties could not ignore its existence” or consider it to be “precarious or transitory.”²²² Baudry-Lacantinerie’s position is that if the parties said nothing about the servitude, they obviously wanted to maintain the status quo.²²³ Thus, Baudry-Lacantinerie focuses on the exterior signs relation to the parties’ reasonable state of mind, and the common owner’s intentions do not bear on his analysis at all.

However, Baudry-Lacantinerie does not completely disavow an element of intent; he argues that “it is important to take into consideration the intention of he who presided over the arrangement when one wants to determine the *extent* of the servitude.”²²⁴ According to Baudry-Lacantinerie, the manner of use of a destination servitude is governed “by the state of things from which the servitude was born.”²²⁵ Such exercise is “restricted to the

219. *Id.*

220. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* (emphasis added).

225. *Id.* § 1127, at 859.

advantages that the owner of the two estates had gotten out of the state of things created or maintained by him.”²²⁶ To resolve a dispute over the extent of a benefit to the dominant estate, “the state of facts anterior to the birth of the servitude must be consulted, and thus the intention of he who presided over the arrangement.”²²⁷ In other words, the common owner’s intention is only relevant when the parties disagree regarding the scope of the rights entailed within the servitude.

For example, consider a modified version of the *Phipps* case.²²⁸ Assume that instead of a driveway, the common owner left in place a narrow alley not meant for vehicular use. Assume further that Phipps claimed that the existing walkway created a servitude of passage which entitled him to expand the walkway’s use so he could drive a vehicle over it. Under Baudry-Lacantinerie’s theory, Schupp could successfully counter that the common owner never intended the walkway to be used for vehicular passage because the exterior signs clearly suggested pedestrian use. Under Baudry-Lacantinerie’s theory, the common owner’s intent is certainly relevant in this scenario because the issue is what *kind* of servitude was created. The actual creation of the servitude, however, involves no inquiry into the common owner’s intent.

C. Which Camp Should Courts Follow?

The differing approaches of the “intent camp” and the “pure tacit agreement camp” illustrate that Professor Yiannopoulos was one-sided in his reliance on the intent theory.²²⁹ French writers approach destination using various theories and disagree as to whether the common owner’s intent has any relevance. Therefore, Professor Yiannopoulos’s intent requirement does not paint a complete picture. Despite Professor Yiannopoulos’s invaluable contributions to Louisiana law, courts should not feel bound to inquire into the intent of the common owner simply because of his position that the French espouse this idea. Louisiana courts ought to take into account both the “intent camp” and the “pure tacit agreement camp.”

Arguably, Professor Yiannopoulos may have pitched his tent with the wrong camp. Professor Yiannopoulos relied heavily on Planiol’s proposition that tacit agreement theory justifies an element

226. *Id.*

227. *Id.*

228. See discussion *supra* Part I.C.3.

229. See Yiannopoulos *supra* note 4, at 79.

of proof of the common owner's intent.²³⁰ This proposition suffers from serious conceptual flaws.²³¹ Whereas tacit agreement theory requires an objective, bilateral analysis of the reasonable beliefs of *both* parties, the common owner's intent requires a subjective, unilateral analysis into *his* actions.²³² As such, tacit agreement theory and the intent requirement are conceptually incompatible.²³³

Furthermore, the cases Planiol cited in support of the intent requirement are not helpful. Because Louisiana's Civil Code articles on destination are rooted in the Napoleonic Code, French jurisprudence interpreting the French Civil Code's destination regime could be persuasive.²³⁴ Therefore, Professor Yiannopoulos justifiably looked to those cases in his article.²³⁵ However, these judgments provide no method for determining a common owner's subjective intent and rarely, if ever, provide any reasoning for the introduction of a subjective element to destination issues.²³⁶

230. See note 172 and accompanying text.

231. See discussion *infra* Part IV.A.

232. See discussion *infra* Part IV.A.

233. See discussion *infra* Part IV.A.

234. See discussion *supra* Part I.D.

235. See Yiannopoulos, *supra* note 4, at 79 n.118; PLANIOL & RIPERT, *supra* note 44, § 966, at 946 n.4.

236. Like their doctrinal brethren, French courts subscribe to tacit agreement theory as the basis of destination. See, e.g., Cour d'appel [CA] [regional court of appeal] Agen, Apr. 16, 1900, D.C. Jur., 1907, 2, 196 (Fr.) ("[A]t the moment of separation of the estates, there is a tacit convention among the owners that the state of things put in place by the owner will be maintained."). The jurisprudence has developed two necessary circumstances for destination to apply: (1) the silence of the act of alienation; and (2) an apparent sign of servitude existing at the moment of separation of estates. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] req., July 9, 1867, S. Jur. I. 1867, 1, 323 (Fr.); Cass. req., Apr. 15, 1872, D.C. Jur. 1872, 1, 416 (Fr.); Cass. req., Jun. 19, 1893, D.C. Jur. 1893, 1, 526 (Fr.).

One of the earliest reported cases held that apparent signs must also be of a permanent and stable character. Cass. req., July 9, 1867, S. Jur. I. 1867, 1, 323 (Fr.). The court in this case found that tree branches hanging over an alleged servient estate were not sufficiently "permanent" because they could be cut. *Id.* According to this decision, even though the trees existed when the estates belonged to the same owner, "[i]t was never the intention of the seller that the trees remained always fixed." *Id.* at 324. The court described the servient estate owner's tolerance of the branches as merely "good neighborly behavior." *Id.* Therefore, the court held that he did not tacitly agree to continue the servitude when he did not cut the branches. *Id.* The court thus refused to acknowledge destination. *Id.* at 325. This case is odd because it did not involve a common owner's *works* but merely the *existence* of trees overhanging a neighbor's property. The court expressly discussed that such a circumstance is not the same as evidence of a common owner's will. *Id.* It would appear, then, that this early case was a poor starting point to determine what works are sufficient to evidence intent.

Although these judgments did focus on proving the intent of the common owner, the issue was often whether the servitude was merely personal in nature.²³⁷ The conceptual difficulties inherent in Planiol's intent requirement are not illuminated by French jurisprudence. Accordingly, these judgments are of scant utility to Louisiana courts and should be read with a wary eye.

As an alternative to Planiol, Louisiana courts might consider Baudry-Lacantinerie's sound theories regarding destination. His theory avoids the theoretical complications posed by Planiol's introduction of a subjective intent element. Because a common owner cannot create a conventional predial servitude by himself, a tacit agreement between the parties to create the servitude is a justifiable way to view destination.²³⁸ A tacit agreement can be inferred when the exterior signs of a burden are of such a degree that "the parties could not ignore its existence."²³⁹ This inquiry involves how the objective signs of a burden should have affected the parties'

Later, French courts decided destination cases with varying results. In one case, the court found that apparent works were sufficient to manifest the common owner's intent to divert river water to a mill. Cass. req., Apr. 15, 1872, D.C. Jur. 1872, 1, 416 (Fr.). That case involved a presumption of intent based on relatively straightforward exterior signs—a manmade ditch leading from the river to the mill. *Id.* Due to the obvious nature of a burden on the estate in that case, the court found sufficient evidence of intent by deferring to the lower court's reasoning. *Id.* Other courts had more trouble accepting exterior signs as evidence of intent. *See, e.g.,* Cass. req., Jun. 19, 1893, D.C. Jur. 1893, 1, 526 (Fr.); Cass. 1e civ., May 8, 1895, S. Jur. I. 1895, 1, 272 (Fr.). For example, one decision held that the existence of a water main left in place by the common owner was not sufficient evidence of intent. Cass. req., Jun. 19, 1893, D.C. Jur. 1893, 1, 526 (Fr.). Because the court deferred to the finder of fact, the court did not reach *why* the signs were insufficient, nor did it discuss the basis of the decision. *Id.* Another case held that although there were exterior signs of a right of passage between two estates, the works were made by a lessee. Cass. 1e civ., May 8, 1895, S. Jur. I. 1895, 1, 272 (Fr.). The court held that works made by a lessee are not indicative of the common owner's intent to create a servitude. *Id.*

237. Some of the cases deal only with the idea that the exterior signs must be indicative of a benefit to the estate and not the owner. *See, e.g.,* Cass. req., July 15, 1875, D.C. Jur. 1877, 1, 127 (Fr.); Cass. req., Mar. 7, 1876, D.C. Jur. 1878, 1, 69 (Fr.). The intent requirement in these cases is misapplied because, in each one, the owner certainly intended to create a servitude, but the court found the intent was to create a *personal* servitude. Cass. req., July 15, 1875, D.C. Jur. 1877, 1, 127 (Fr.); Cass. req., Mar. 7, 1876, D.C. Jur. 1878, 1, 69 (Fr.). The issue in these cases was what *kind* of servitude was created, not the common owner's intent to create one. Cass. req., July 15, 1875, D.C. Jur. 1877, 1, 127 (Fr.); Cass. req., Mar. 7, 1876, D.C. Jur. 1878, 1, 69 (Fr.).

238. *See* discussion *supra* Part III.B.

239. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

reasonable state of mind and not how the signs evidence what the common owner intended to do when he created the works.

Furthermore, Baudry-Lacantinerie is justified in his position that intent is only relevant when the extent of a servitude is disputed.²⁴⁰ The use and extent of a predial servitude are governed by the title that created it.²⁴¹ In the case of destination, the law recognizes destination as a title for conventional and apparent servitudes.²⁴² This fictitious title can only be the situation existing at separation of ownership because destination only arises in the absence of an agreement.²⁴³ Therefore, the situation between the estates governs the use and extent of the servitude. Because there is no written title, the only way to determine the extent of a destination servitude is to examine evidence of the benefit the common owner intended to confer upon the dominant estate.²⁴⁴ Evidence of the common owner's intent is relevant in this scenario because it relates to what the parties expected the situation to be. However, regarding the creation of a servitude, the common owner's intent is irrelevant because that issue is confined to whether the parties believed a burden existed on one of the estates.

The writers in the "pure tacit agreement camp"—especially Baudry-Lacantinerie—provide other views on destination that Professor Yiannopoulos perhaps should have considered. Their explanations of destination are less conceptually troublesome than those who subscribe to the idea that the common owner's intent is relevant. Louisiana courts ought to consider the advantages of taking the pure tacit agreement approach.

IV. THE INCOHERENCE OF THE "INTENT" IDEA

The intent requirement is now applied in Louisiana destination law because of Professor Yiannopoulos's adoption of the idea.²⁴⁵ The *Bienville* court, "free[d]" by Professor Yiannopoulos's assertion that "intent is no longer presumed,"²⁴⁶ explained destination as follows:

A servitude that is created by destination of the owner is based on the idea that when the owner of two estates transfers one of them to another person, there is a tacit

240. *Id.*

241. LA. CIV. CODE art. 697 (2011).

242. Yiannopoulos, *supra* note 4, at 74.

243. LA. CIV. CODE art. 741.

244. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1127, at 859.

245. *See* discussion *supra* Part II.

246. Yiannopoulos, *supra* note 4, at 79 n.119.

agreement between the parties that the existing relationship between the estates will be maintained. Thus, the common owner must intend to create an apparent servitude and such intent must be evidenced by exterior signs which are consistent with the nature and extent of the servitude claimed.²⁴⁷

The intent requirement's inherent theoretical difficulties are readily apparent in the *Bienville* court's statement. The second sentence does not follow from the first. The parties, at separation of ownership, cannot tacitly agree to continue a conventional servitude that was never created in the first place.²⁴⁸ Tacit agreement theory avoids this conundrum by implying a fictional title to a conventional servitude.²⁴⁹ To inject an element of the common owner's subjective intent brings the conundrum back to the forefront.

A. Conceptual Differences Between Intent and Tacit Agreement

"[A] tacit agreement between the parties" and the idea that "the common owner must intend to create an apparent servitude" are different concepts.²⁵⁰ Tacit agreement theory is an objective idea that implies a bilateral agreement between the parties.²⁵¹ On the other hand, the intent requirement is a subjective idea that relates to the common owner's unilateral intentions.²⁵²

Tacit agreement theory essentially determines what the parties should have subjectively believed based upon the objective exterior signs of a burden on the servient estate.²⁵³ If a burden was sufficiently apparent to the parties, the law implies a subjective agreement between them that the burden will remain in effect.²⁵⁴ Because there is no actual agreement between the parties, the objective exterior signs are the only way to determine what the parties should have reasonably believed.²⁵⁵ In other words, the subjective element of the tacit agreement can only be established through objective means. Therefore, for all intents and purposes, a

247. 730 *Bienville Partners, Ltd. v. First Nat'l Bank of Commerce*, 596 So. 2d 836, 839–40 (La. Ct. App. 4th 1992) (emphasis omitted) (citations omitted) (internal quotation marks omitted).

248. See discussion *supra* Part III.B.

249. See discussion *supra* Part III.B.

250. *Bienville*, 596 So. 2d at 839–40.

251. See Hargrave, *supra* note 11, at 960.

252. See *id.*

253. See *id.*

254. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

255. See *id.*; see also Hargrave, *supra* note 11, at 960.

tacit agreement between the parties is an objective inquiry. The question of the common owner's intent is far more subjective. Under the intent requirement, the exterior signs do not imply any state of mind on the part of the common owner—they must prove his *actual*, unilateral intent to create a servitude.²⁵⁶

B. Louisiana Should Take an Objective Approach

Louisiana courts should tackle destination issues objectively, framed in terms of tacit agreement theory alone. Practically, this approach makes more sense than requiring courts to probe the common owner's subjective intent. Louisiana Civil Code article 741 provides a simple, objective method for establishing a conventional predial servitude despite the absence of an agreement between the parties.²⁵⁷ When the exterior signs of a burden clearly suggest that the parties cannot ignore its existence, article 741 is meant to supply a fictional agreement between them.²⁵⁸ As explained by French doctrine, tacit agreement theory is designed to supply the same fictional agreement as a form of title.²⁵⁹ Thus, framing destination in terms of the objective tacit agreement theory aids in the application of article 741.

Conversely, the intent requirement frustrates the application of article 741 because it may sometimes be difficult for the exterior signs to prove what the common owner subjectively intended. For example, consider a situation in which the common owner of a large estate creates a charge in favor one portion of it, such as a walkway to a back house. The owner then sells the entire estate to someone else and moves away. The new owner decides to make the walkway a driveway and improves it accordingly. The second owner then dies, and the estate is partitioned. Many years later, a dispute arises between the two new owners regarding the driveway. If a court were required to probe into subjective intent, it would be unclear whether the exterior signs should relate to the intent of the original, common owner who created the walkway or the intent of the subsequent common owner who improved it into a driveway. Either way, a court may have a difficult time trying to probe into the subjective state of mind of the absent original owner or the long deceased second owner. However, if the court were to apply article 741 objectively, the determination would simply be whether the parties should have reasonably believed that the

256. Hargrave, *supra* note 11, at 960.

257. LA. CIV. CODE art. 741 (2011).

258. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

259. See discussion *supra* Part III.B.

driveway would remain there. An objective analysis of the exterior signs would easily resolve this dispute.

As the foregoing example illustrates, an objective approach would lessen Louisiana courts' burden when deciding destination cases. An objective approach is especially valuable in situations in which the common owner is not a party, is absent, or is deceased.²⁶⁰ Determining whether the burden was apparent under the meaning of article 707 would effectively resolve any destination dispute without the parties having to prove what the common owner intended when he created the situation at issue.²⁶¹ The objective inquiry of whether a party's belief is reasonable based on exterior signs is relatively simple to determine because it is grounded on tangible, empirical evidence.²⁶² Whether a belief is reasonable would depend on the circumstances of each case, based on the exterior signs available to the parties at the moment that common ownership ceased.²⁶³

For example, the *Bienville* and *Phipps* cases could have been decided far more easily than they were.²⁶⁴ In *Phipps*, the Louisiana Supreme Court reached the right result but for the wrong reason. The court felt that the exterior signs were indicative of the common owner's subjective intent to create an apparent servitude.²⁶⁵ The practical effect of *Phipps* is to put a greater burden of proof on the party claiming destination. It naturally takes more evidence to prove the common owner's subjective intent than to prove a reasonable inference of intent based on exterior signs. An objective application of article 741 streamlines the determination of the issue. If the *Phipps* court had applied article 741 objectively, there would have been no question that an apparent servitude had come into existence the moment that the estates were divided. The driveway itself should have suggested to the parties that a servitude of passage would exist between the estates.²⁶⁶ A waste of judicial resources, as well as Phipps's time and money, could have been avoided under a simple, objective application of the article. Similarly, the *Bienville* court would have been able to reach its correct conclusion but for the *right* reason. Under an objective approach, the court could have determined that the servitude was not apparent when Royal sold the garage and dispensed with the destination argument easily.²⁶⁷

260. LAURENT, *supra* note 48, § 172, at 204.

261. LA. CIV. CODE art. 707. Apparent servitudes by definition are evidenced by exterior signs, works, or constructions. *Id.*

262. Hargrave, *supra* note 11, at 960.

263. *Id.*

264. See discussion *supra* Part II.B–C.

265. See discussion *supra* Part II.C.

266. Hargrave, *supra* note 11, at 960.

267. See discussion *supra* Part II.D.

An objective approach to destination is also desirable from a policy standpoint. Destination protects buyers' reasonable expectations as to what they are contracting for when they buy property.²⁶⁸ When the contract of sale says nothing about an obvious burden on one of the estates, destination protects a party who reasonably expected the situation to remain in place. An objective determination of whether the burden was apparent allows a party to easily prove that its expectation regarding the servitude was reasonable. On the other hand, the parties' reasonable beliefs are not protected when evidence of the common owner's intent enters into the equation.²⁶⁹ Most buyers probably do not expect to one day have to litigate issues regarding what someone many years ago intended to do on their property. It is unreasonable to expect them to do so.

CONCLUSION

The French institution of destination is an important part of Louisiana civilian property law. If Louisiana courts were to consider the various French doctrinal approaches to destination, it would become clear that an objective approach is appropriate. Destination is meant to imply a title to a conventional predial servitude despite the absence of an agreement.²⁷⁰ Tacit agreement theory is a useful theoretical device to aid in the interpretation of destination. Under tacit agreement theory, the objective signs of a burden create the fictional agreement between the parties. Tacit agreement theory thus explains how a conventional predial servitude can be created without an express "convention."²⁷¹ The soundest theoretical explanation belongs to Baudry-Lacantinerie—if intent is relevant at all, it only bears on the extent of the servitude.²⁷² In other words, intent should only be looked to when the physical manifestation of the servitude creates an ambiguity as to the use for which the servitude was meant.²⁷³

To avoid unjust results like the lower courts' determination in the *Phipps* case, courts should not look to evidence of the common owner's intent.²⁷⁴ When deciding a destination issue, a court would

268. See Catherine Mitchell, *Leading a Life of Its Own? The Roles of Reasonable Expectations in Contract Law*, 23 OXFORD J. LEGAL STUD. 639, 648 (2003).

269. LAURENT, *supra* note 48, § 172, at 204.

270. BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1115, at 845.

271. See discussion *supra* Part III.B.

272. See BAUDRY-LACANTINERIE & CHAUVEAU, *supra* note 43, § 1127, at 859; see also discussion *supra* Part III.C.

273. See discussion *supra* Part III.C.

274. See discussion *supra* Part II.C.

do well to adhere to the old adage, *the writing's on the wall*. In terms of predial servitudes, the expression refers to obvious evidence of a burden on the estate. When it comes to the fate of the intent requirement, perhaps the writing's on the wall as well.

Marshall L. Perkins^{*}

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